No. [redacted]255

FILED
AUG 3 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1936.

THE ELMHURST CEMETERY COMPANY OF JOLIET, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and Brief in Support Thereof.

ELDEN MCFARLAND,
618 Southern Building,
Washington, D. C.,
Attorney for Petitioner.

Of Counsel:
EDWARD J. QUINN,
J. F. RIORDAN,
134 South LaSalle Street,
Chicago, Illinois.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Summary Statement of Matter Involved	1
Reasons Relied on for Granting the Writ	4
Brief in Support of Petition for Writ of Certiorari	7
I. Opinions Below	7
II. Jurisdiction	7
III. Statutes Involved	7
IV. Statement of the Case	7
V. Specification of Errors	8
VI. Argument	9
(1) In reversing the Board the Circuit Court of Appeals erroneously passed upon the weight of evidence and made findings of fact, substituting its judgment for that of the Board	9
(2) The Circuit Court of Appeals erroneously held that the presumption of correctness of the Commissioner's finding of value continued in the case after the presentation by the petitioner of substantial uncontroverted evidence showing a different value	10
(3) The reasoning adopted by the appellate court is unjust and fallacious	11
Conclusion	16

CASES CITED.

Boom Co. v. Patterson, 98 U. S. 403, 408, 25 L. Ed. 206	15
Burnet v. Houston, 283 U. S. 223, 228, 51 S. Ct. 413, 415, 75 L. Ed. 991, 994	15
Burnet v. Logan, 283 U. S. 404, 51 S. Ct. 550, 75 L. Ed. 1143	15
Del Vecchio v. Bowers, 296 U. S. 280, 56 S. Ct. 190, 80 L. Ed. 163	4, 11

Page

Doyle v. Mitchell Bros. Co., 247 U. S. 179, 38 S. Ct. 467, 62 L. Ed. 1054 ..... 15, 16

Fairmount Cemetery Association v. Helvering, 79 Fed. (2d) 163 ..... 5, 14

Forest Preserve District v. Chilvers, 344 Ill. 573, 577, 176 N. E. 720, 721 14

General Utilities & Operating Co. v. Helvering, 296 U. S. 200, 56 S. Ct. 185, 80 L. Ed. 174 ..... 4, 10

Helvering v. Rankin, 295 U. S. 123, 55 S. Ct. 732, 79 L. Ed. 1343 ..... 4, 10

Helvering v. Taylor, 293 U. S. 507, 55 S. Ct. 287, 79 L. Ed. 628 11

Lucas v. Alexander, 279 U. S. 573, 49 S. Ct. 426, 73 L. Ed. 851 15

McCaughn v. Real Estate Land, Title and Trust Company, et al., 297 U. S. —, 56 S. Ct. 604, 80 L. Ed. 619 ..... 4, 10

Phillips v. Commissioner of Internal Revenue, 283 U. S. 589, 600, 51 S. Ct. 608, 613, 75 L. Ed. 1289, 1299 9

IN THE

Supreme Court of the United States

October Term, 1936.

THE ELMHURST CEMETERY COMPANY OF JOLIET, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and Brief in Support Thereof.

May it Please the Court:

The petitioner, The Elmhurst Cemetery Company of Joliet, by Elden McFarland, its attorney, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit (R. 41) reversing the order of the United States Board of Tax Appeals (R. 18), and the order of that court denying a Petition for Rehearing (R. 42).

SUMMARY STATEMENT OF MATTER INVOLVED.

This case involves the determination of the basis for computing gain upon the sale of cemetery burial lots acquired as acreage in 1909 and sold as burial lots in 1926, 1927 and 1928. In its income tax return petitioner computed its profit on the basis of a March 1, 1913 value of 76.6 cents per square foot (R. 16). The respondent determined that the lots had a fair market value as of March 1, 1913 of 23.96 cents per square foot (R. 6), which was in excess of

the cost (R. 11). The petitioner filed with the United States Board of Tax Appeals a petition for redetermination of the resulting proposed deficiency. The case was heard; and the Board found a value of 76.6 cents per square foot, based on average selling price of lots in the same cemetery for the year ended March 1, 1913 (R. 18), together with evidence that the reasonable expectation was that the values of the lots would increase from year to year (R. 12, 14). The Circuit Court of Appeals reversed the Board, holding that the actual sales prices of such lots in 1913 was not a satisfactory method of determining value (R. 39, 40); that a discount method of valuation was more equitable (R. 40); that the evidence of such sales was not evidence of value; and that there was no evidence to support the Board's finding of value (R. 40). It thereupon reversed the Board, holding that the petitioner had not overcome the presumption of correctness of the respondent's determination.

The undisputed facts are as follows: In 1909 petitioner acquired 137 acres of land near Joliet, Illinois, at a cost of $60,000 (R. 11). Between 1909 and March 1, 1913 it developed the north 37 acres for cemetery purposes. The development consisted of construction of roads, drives, pools, leveling and grading, landscaping, planting of flowers, trees and shrubs, construction of buildings and fences (R. 11, 17, 5), at a cost of $35,000 (R. 17). From the acreage so improved, its sales of grave plots have since been made.

Sales each year from 1909 to 1918 were as follows:

1909	7308	sq. ft. @	73¢
1910	7005.55	" " @	71.5¢
1911	7312.20	" " @	70.2¢
1912	6320.20	" " @	77.6¢
1913	8506.10	" " @	79.5¢
1913—month of March	312	" " @	78.08¢
1914	—		75.6¢
1915	—		78.1¢
1916	—		80¢

Sales for 1926, 1927 and 1928 were:

1926	14,939.9 sq. ft.	@ $1.55
1927	10,979 " "	@ $1.66
1928	17,077.5 " "	@ $1.77

(R. 12, 17).

The average sale price of lots sold in the improved area from March 1, 1912 to March 1, 1913 was 76.6 cents per square foot (R. 15).

Inasmuch as the experience of cemeteries is that as more lots are sold the remaining lots become increasingly valuable (R. 12), and that as a general rule for every head of a family buried, four new families purchase burial lots, petitioner in 1913 expected a gradual increase in sales price per square foot each year (R. 14). Although the average annual expense for taking care of the grounds was about $4,000 there was incidental income from interments, planting flowers, care of flowers and sales of flowers to offset that expense (R. 14).

Counsel for the Government stated that the Government engineer arrived at his valuation by discounting cost over the prospective time of sale to reduce it to a present value, using the discount method of arriving at a valuation (R. 15). Beyond the statements of counsel that the respondent valued the land by formula, there is no evidence of the method by which he chose the figures at which he fixed the basis for determining gain (R. 17).

It would take from 50 to 75 years to sell all of the lots in the improved section (R. 13).

The respondent offered no evidence at the hearing (R. 15).

The Board accepted average selling price of similar lots as a basis for the March 1, 1913 value. The Circuit Court of Appeals held that the Board erred in taking such selling price as the basis of value and held that "selling price less discount for the years required to realize the selling price" was a "far more equitable" basis (R. 40).

The court further held that "the selling price of a few lots would have to give way before the more satisfactory evidence of cost price" (R. 40).

The court also said: "The burden was upon respondent to show this valuation (by the Commissioner) was not only incorrect, but to present some evidence to support the higher figure. This burden has not been overcome in the case before us" (R. 40). And accordingly it reversed the Board.

B.

REASONS RELIED ON FOR GRANTING THE WRIT.

1. The Circuit Court of Appeals for the Seventh Circuit has decided a federal question in a way probably not in accord with applicable decisions of this Court.

(a) In reversing the Board of Tax Appeals it has passed upon the weight of evidence and has substituted its judgment for that of the trial tribunal, contrary to the rule stated by this Court in *McCaughn* v. *Real Estate Land, Title and Trust Company, et al.*, 297 U. S. ——, 56 S. Ct. 604, 80 L. Ed. 619. Cf. *Helvering* v. *Rankin*, 295 U. S. 123, 55 S. Ct. 732, 79 L. Ed. 1343, and *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200, 56 S. Ct. 185, 80 L. Ed. 174.

(b) It has held that the presumption of correctness of the respondent's determination as to a question of fact continued in and was determinative of the case, where the record shows that petitioner produced substantial evidence controverting such determination. The effect of such holding is contrary to the rule announced in *Del Vecchio* v. *Bowers*, 296 U. S. 280, 56 S. Ct. 190, 80 L. Ed. 163, that a presumption continues in a case only so long as no material evidence in respect thereof is produced.

2. The Circuit Court of Appeals for the Seventh Circuit has rendered a decision the effect of which is in conflict with that of the United States Court of Appeals for the

District of Columbia in the case of *Fairmount Cemetery Association* v. *Helvering*, 79 Fed. (2d) 163, in the following particulars:

(a) The latter court held that where the Commissioner's valuation of cemetery lots is shown to be mere guesswork, the presumption in favor of the Commissioner's finding must yield to undisputed evidence of value contradictory to such finding.

(b) The latter court further held that if the time element (discount method) is to be used as a factor in determining the valuation of cemetery lots, it should be applied to the *particular lots involved* and not to the entire acreage.

The Circuit Court of Appeals for the Seventh Circuit held in the instant case that as a matter of law the time element (discount method) when applied to the *entire acreage* was an equitable method of determining value of the particular lots involved.

3. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of federal law which has not been but should be settled by this Court, *i. e.*, it has decided that the respondent's method of discounting the current March 1, 1913 sales price of cemetery lots as a basis for determining fair market value of lots on March 1, 1913, is a far more equitable method of determining the value on that date of lots subsequently sold, than the method of establishing the value on that date by reference to sales price of similar lots.

This principle affects directly the taxable gain for each year of every active cemetery in the United States which was established prior to March 1, 1913. Petitioner is informed that more than one hundred cases involving this principle of the discount method of valuation of cemetery lots are now pending in the Treasury Department.

WHEREFORE, your petitioner respectfully prays that this Honorable Court duly issue its writ of certiorari, directed

to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Honorable Court for its review and determination, on a day certain to be therein named, the full and complete transcript of the record and all proceedings in this case; and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court; and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

August 3, 1936.

THE ELMHURST CEMETERY COMPANY OF JOLIET,

By: ELDEN MCFARLAND,
618 Southern Building,
Washington, D. C.
Attorney for Petitioner.

Of Counsel:

EDWARD J. QUINN,
J. F. RIORDAN,
134 South LaSalle Street,
Chicago, Illinois.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the United States Board of Tax Appeals in this case is not reported. It is set forth in the record at page 16. The opinion of the United States Circuit Court of Appeals is reported at 83 Fed. (2d) 4 (R. 38).

II.

JURISDICTION.

This Court has jurisdiction to review the judgments below under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, 938. The judgments sought to be reviewed were entered March 17, 1936, and May 21, 1936 (R. 41, 42).

III.

STATUTES INVOLVED.

The applicable statutes are Sec. 204 (b) of the Revenue Act of 1926, C. 27, 44 Stat. 9, 16 and Sec. 113 (b) of the Revenue Act of 1928, C. 852, 45 Stat. 791, 821, which are practically identical in wording and read as follows:

> "The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property * * * or, (B) the fair market value of such property as of March 1, 1913, whichever is greater."

IV.

STATEMENT OF THE CASE.

The facts are stated in the accompanying petition for certiorari.

V.

SPECIFICATION OF ERRORS.

1. The United States Circuit Court of Appeals for the Seventh Circuit erred in holding and deciding that there was no evidence to support the Board's finding of fair market value of the properties involved, as of March 1, 1913.

2. The said court erred in holding and deciding that evidence of sales of similar properties made at or about March 1, 1913, was not evidence of fair market value as of March 1, 1913, of the properties involved.

3. The said court erred in holding and deciding that the presumption of correctness of the respondent's determination of value continued in the case after the petitioner produced substantial uncontroverted evidence in conflict with such determination.

4. The said court erred in weighing the evidence and in substituting its own judgment as to the weight thereof for that of the Board.

5. The said court erred in holding and deciding that where the prospective future selling price of property is greater than the present selling price thereof the present fair market value may be determined by discounting the present selling price over the period of years intervening until the probable time of sale.

6. The said court erred in not holding and deciding that if the discount method of valuation is to be applied, it should be applied to the particular lots involved and not to the entire acreage.

7. The said court erred in not holding and deciding that if the discount method of valuation is to be applied, it should be applied in reducing the probable ultimate sales price to a present worth.

8. The said court erred in assuming, contrary to the uncontroverted facts, that the sales price reasonably to be expected in the future was as of March 1, 1913, the same as the sales price as shown by the then current sales.

9. The said court erred in holding and deciding that the cost of the property purchased as acreage in 1909 was satisfactory evidence of the fair market value as of March 1, 1913, of the cemetery lots sold in 1926, 1927 and 1928.

10. The said court erred in not granting petitioner's motion for rehearing.

VI.

ARGUMENT.

(1) In reversing the Board the Circuit Court of Appeals erroneously passed upon the weight of evidence and made findings of fact, substituting its judgment for that of the Board.

Findings of the Board of Tax Appeals on issues of fact should be accepted by the court as conclusive if the evidence was legally sufficient to sustain them and if there was no irregularity in the proceedings. *Phillips* v. *Commissioner of Internal Revenue,* 283 U. S. 589, 600, 51 S. Ct. 608, 613, 75 L. Ed. 1289, 1299.

In the instant case the Board found that the fair market value as of March 1, 1913, of the cemetery lots sold in 1926, 1927 and 1928 was 76.6 cents per square foot (R. 18). That finding was supported (a) by evidence of the sales price of lots in the same part of the same cemetery as of March 1, 1913 (R. 17, 18, 12, 13); (b) by the statement of the sole witness, Herbert W. Spencer, that he, personally, had sold most of the lots, that he fixed the sales price by visiting a good many other cemeteries (R. 13), and that he arrived at a value of 76.6 cents per square foot as of March 1, 1913, by taking the average value of lots sold from March 1, 1912 to March 1, 1913 (R. 15); and (c) by the fact that the actual selling price of $1.55, $1.66 and $1.77 per square foot in

1926, 1927 and 1928 (R. 12) is corroborative of the 1913 value found by the Board. These latter sums if discounted at 6 per cent compounded annually will approximate the value of 76.6 cents per square foot found by the Board.

There is, therefore, substantial evidence to support the Board's finding. And the Board was satisfied that such value was "reasonable and should be allowed" (R. 18).

The appellate court, however, was not satisfied with the Board's judgment, for it said, reversing the Board:

> "While selling price is often a satisfactory way of determining value it is not always so"; and
>
> "We think the facts in this case necessitate the rejection of the selling price as the sole determinator of value"; and
>
> "Far more equitable is the selling price less discount for years required to realize said selling price"; and
>
> "* * * we think that the selling price of a few lots would have to give way before the more satisfactory evidence of cost price."

Without dwelling upon the fallacies of the court's reasoning, the fact remains that whether the court's reasoning was sound or unsound, it did substitute its own judgment for that of the Board as to questions of fact. Such action, in the face of the material evidence supporting the Board's finding of value, was erroneous. *McCaughn* v. *Real Estate Land, Title and Trust Company, et al.*, 297 U. S. ——, 56 S. Ct. 604, 80 L. Ed. 619; *Helvering* v. *Rankin*, 295 U. S. 123, 55 S. Ct. 732, 79 L. Ed. 1343; *General Utilities Operating Co.* v. *Helvering*, 296 U. S. 200, 56 S. Ct. 185, 80 L. Ed. 174.

(2) The Circuit Court of Appeals erroneously held that the presumption of correctness of the Commissioner's finding of value continued in the case after the presentation by the petitioner of substantial uncontroverted evidence showing a different value.

While it is true that the law presumes that the respondent's determination as to a question of fact is correct, that

presumption continues in the case only so long as no material evidence on the issue is introduced in evidence. Thereupon the presumption disappears from the case. *Del Vecchio* v. *Bowers*, 296 U. S. 280, 56 S. Ct. 190, 80 L. Ed. 163. Cf. *Helvering* v. *Taylor*, 293 U. S. 507, 55 S. Ct. 287, 79 L. Ed. 628.

That petitioner produced material evidence controverting the respondent's determination of value, is demonstrated hereinabove at page 9. Respondent thereafter produced no evidence whatever, and petitioner's evidence of value remained unchallenged. The appellate court, therefore, erred in holding that the presumption of correctness of the respondent's determination continued in the case after the introduction of petitioner's evidence of value.

(3) The reasoning adopted by the appellate court is unjust and fallacious.

Petitioner has pointed out that the appellate court erred, as a matter of law, in substituting its own judgment for that of the Board in reversing the Board's finding of value. That the court's reasoning was unfair and erroneous is equally manifest.

(a) The court said:

> "We think the facts in this case necessitate the rejection of selling price as the sole determinator of value. Far more equitable is the selling price less discount for years required to realize said selling price" (R. 40).

We have pointed out above that sales price was not the sole determinator of value. There was corroborating evidence not only by the witness Spencer but also by the subsequent sales.

Furthermore, the court did not apply logically the rule it announced as to use of discount. A discount method of valuation is a method whereby one arrives at the present value of a sum of money to be received in the future. In

the instant case the sum to be received in the future for the particular lots in question, *i. e.*, those sold in 1926, 1927 and 1928, was, respectively, $1.55, $1.66 and $1.77 per square foot. The court, as well as the Commissioner, *erroneously assumed* that the *future* selling price would be the *March 1, 1913* selling price. *There is no evidence in the record to support such an assumption.* The evidence points to the contrary, that is, that there would be an *increase* in selling price as time passed. The witness, Spencer, said: "We hoped for a gradual increase in sales every year because as a general rule, for every head of a family that is buried you secure four new families. That is a rule cemeteries have adopted" (R. 14); and "* * * it is a fact that as the number of lots remaining unsold decreases, the unsold lots increase in price * * * it increases for years after the cemetery is organized" (R. 12).

In addition to the foregoing, the record of sales prices shows a steady increase of from 70.2 cents per square foot in 1911 to 80 cents per square foot in 1916 (R. 12, 17), and an increase thereafter to $1.55, $1.66 and $1.77 in 1926, 1927 and 1928, respectively.

The court's assumption, therefore, was contrary not only to the anticipated facts as they existed in 1913 but also to the actual facts which corroborate the anticipated facts.

Had the court discounted the actual selling price of these lots from 1926, 1927 and 1928 to get the "present worth" as of 1913 such a method would have produced a value in excess of 72 cents per square foot. This closely approximates and corroborates the soundness of the Board's finding of 76.6 cents per square foot.

(b) The court also said that the Board's finding of value based on selling price was erroneous because:

> "while selling price is often a satisfactory way of determining value it is not always so. Heiner v. Crosby, 24 Fed. (2d) 191 (C. C. A. 3d); Chicago Ry. Equipment Co. v. Blair, 20 Fed. (2d) 10, 13 (C. C. A. 7th)" (R. 39).

In the Crosby case, *supra,* cited by the court, there was material evidence showing why, because of controlled market conditions, the quoted market selling price was not a satisfactory method of determining fair market value. In the instant case there is not even a suggestion, much less a contention, that the prices at which burial lots were being sold in this cemetery as of March 1, 1913, were not, in fact, prices representing the fair market value of those lots. Moreover in the *Crosby case, supra,* the court held that while sales of similar properties was *some* evidence of value, such evidence was not controlling in the face of other evidence of value. In the instant case the court held that sales of similar property was *no evidence* of value whatever.

In the Chicago Ry. Equipment Co. case, *supra,* also cited, the court held that the Board of Tax Appeals erred in finding that there was no evidence of the value of the property involved where there was in the record competent and material evidence bearing upon that issue. This same court in the instant case has done exactly what it reversed the Board for doing in the Chicago Ry. Equipment Co. case. Where there is competent material evidence of value in this case the court has held that there is none.

(c) The court also said:

> "An impartial view would be, we think, that the selling price of a few lots would have to give way before the more satisfactory evidence of cost price" (R. 40).

This observation apparently contains two misconceptions: first, that it is necessary to measure the value of the entire tract by the sales price of a few lots and, second, that the cost price of the property as acreage in 1909 is a fair measure of the value of individual burial lots in 1913.

Judging from its "Christmas tree" illustration (R. 39), the court apparently was moved by the hypothetical thought that 200,000 Christmas trees could not be valued on a basis

of 25 cents each where sales were made to but one hundred persons per year at 25 cents per tree (R. 39).

The intimation is that 37 acres of cemetery lands cannot be valued by the sale of 7,000 or 8,000 square feet in one year—there being 43,560 square feet in each acre.

But in 1927 only 10,979 square feet were sold (R. 17). Our problem as to the year 1927 is not to value the entire 37 acres—much of which obviously must be wastage for roads, pools, buildings, walks, shrubs, trees and fences—but to value as of 1913 the footage sold in 1927. *Fairmount Cemetery Association* v. *Helvering,* 79 Fed. (2d) 163, 165.

The 8506.10 square feet sold in 1913 should be a comparable amount with, and a reasonable index to the value as of the same time of, 10,979 square feet of the same kind of property in the same area. And the Board so held. To revert to the court's illustration—the fair selling price of 100 Christmas trees to 100 people should be a reasonable index to the fair selling price of 115 Christmas trees to 115 people, especially if sold from the same grove at the same time.

It may be observed however that the Court's Christmas tree illustration is, on the whole, not a comparable case because there was no assurance or accepted trade experience that there would be an increase in the price per unit as the number of units remaining unsold decreased.

Passing to the second misconception, the court apparently considered cost of acreage in 1909 a better indication of the value of cemetery lots in 1913 than the sales price of similar lots and similar quantities of lots in 1913.

Such a conclusion not only finds no support in the record, but is contrary to generally accepted facts. The value of unimproved farm lands cannot be compared with the value of improved cemetery lots. "Lacking the same elements of value the comparison is pointless." *Fairmount Cemetery Association* v. *Helvering,* 79 Fed. (2d) 163, 164. There is a distinction between the valuation of acreage and of subdivided lots. *Forest Preserve District* v. *Chilvers,* 344 Ill.

573, 577, 176 N. E. 720, 721. Value must be determined with reference to the uses to which property is adapted. *Boom Co.* v. *Patterson,* 98 U. S. 403, 408, 25 L. Ed. 206.

Nor does the cost of property in 1909 afford a presumption as to its value in 1913. *Burnet* v. *Houston,* 283 U. S. 223, 228, 51 S. Ct. 413, 415, 75 L. Ed. 991, 994.

The court's finding that the cost of the acreage in 1909 is a better method of determining value as of 1913 of cemetery lots than the actual selling price of similar lots in 1913 is, therefore, erroneous in fact as well as in law.

(d) The court's valuation results in the taxation of an increment in value which occurred prior to March 1, 1913.

Under the fundamental theory underlying the taxation of gain resulting from capital increase, as distinguished from the taxation of income resulting from the production or use of capital, as applied to property acquired prior to March 1, 1913, the amount or sum to be taxed is measured by the realized increase between the cost or value on March 1, 1913 (whichever is greater) and the selling price. *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 38 S. Ct. 467, 62 L. Ed. 1054. This principle has been applied uniformly by this Court to the Revenue Acts adopted under the Sixteenth Amendment. *Lucas* v. *Alexander,* 279 U. S. 573, 49 S. Ct. 426, 73 L. Ed. 851; *Burnet* v. *Logan,* 283 U. S. 404, 51 S. Ct. 550, 75 L. Ed. 1143.

If we were to compute the gain arising from the sale of the 312 square feet sold in March, 1913 (R. 17) such gain would be the difference between the selling price of 78.08 cents per square foot and (under the court's finding) 23.96 cents per square foot—a gain of 54.12 cents per square foot, or over 225 per cent over night! Obviously that was not the true gain. The only real increment that occurred subsequent to March 1, 1913, was an increment in excess of the then fair value, which under the facts obviously was in the neighborhood of 76.6 cents per square foot. Any increment in value as represented in the March, 1913 selling price of 78.08 cents per square foot must have occurred prior to

that time. Yet, under the court's finding of value, each and every square foot sold subsequent to March 1, 1913, results in a gain which includes that prior increment. To tax such prior increment is contrary to the rule announced in *Doyle* v. *Mitchell Bros. Co., supra.* On the other hand under the method applied by the Board and contended for by the petitioner only the realized increment *subsequent* to March 1, 1913, is taxed. This is fair and just and is in harmony with the spirit as well as the letter of the Revenue Acts.

Petitioner, therefore, respectfully submits that the Circuit Court of Appeals for the Seventh Circuit erred as a matter of law in substituting its judgment for that of the Board; that it erred as a matter of law in holding that the presumption of correctness of the Commissioner's determination continued in the case after material evidence controverting such determination was produced; and that its reasoning in its determination of value was fallacious, to the injury not only of this petitioner but indirectly of many others similarly situated.

CONCLUSION.

WHEREFORE, the petitioner respectfully submits that this is a case in which a writ of certiorari should be issued to review the decision of the Circuit Court of Appeals.

ELDEN MCFARLAND,
618 Southern Building,
Washington, D. C.,
Attorney for Petitioner.

Of Counsel:
EDWARD J. QUINN,
J. F. RIORDAN,
134 South LaSalle Street,
Chicago, Illinois.